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Explanation of a Deposition for Clients and Witnesses

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EXPLANATION OF A DEPOSITION FOR CLIENTS AND WITNESSES

Since your deposition is going to be taken, the purpose of this explanation is to inform you what a deposition is, why and how it will be taken, and pitfalls to be avoided during its taking.

DESCRIPTION:

A deposition is your testimony under oath. You will be asked questions by the opposing attorney and in some cases by your attorney. There will be a court reporter present taking down everything you say; therefore, everything said must be accurate and truthful. A discovery deposition is not like the Perry Mason show. There will be no judge present and in all likelihood the deposition will not even be taken in a courtroom. I will be there with you during the time the other side is asking you questions. There is no judge presiding and ruling over objections although the judge may do so later.

PURPOSE:

The purpose of the discovery deposition is to discover all the facts a witness may know, which will assist the lawyer in the preparation and trial of the lawsuit. It also helps to settle the case because the facts are known by both sides. It is the normal and customary thing to take a discovery deposition in almost all civil jury cases. The opposing side is taking your deposition for three reasons. The first reason is that they want to find out what facts you have in your actual knowledge and possession regarding the issues in the lawsuit. In other words, they are interested in what your story is now and what it is going to be at the trial. Secondly, they want to pin you down to a specific story so that you will have to tell the same story at the trial so that they will know in advance what your story is going to be. And thirdly, they hope to catch you in a lie. They could then show at the trial that you are not a truthful person, and your testimony should not be believed on any of the points, particularly the crucial ones.

These are legitimate purposes, and the opposing side has every right to take your discovery deposition for these purposes and in this fashion. Correspondingly, we have the same right to take the discovery deposition of the opposing party litigant and witnesses.

At the time of the discovery deposition you should remember that this is probably the first opportunity that the opposing counsel has to meet you. You will be judged by opposing counsel as to such things as your honesty, frankness and possible jury appeal. It is important that you make a good impression upon opposing counsel. Therefore, you should appear at deposition time dressed as you would expect to dress if you were actually going to court to appear before the jury.

INSTRUCTIONS:

Tell the truth succinctly. Avoid long narrative answers. The more subjects you bring up, the more questions they will ask. Do not volunteer guesses, opinions or rumors. Beware of the clever inquisitor's stare, whereby he or she hopes you will feel compelled to elaborate.

Do not bring notes, diagrams, books and other aids to the deposition unless commanded to by subpoena. If you rely on them for your deposition testimony, you may be cross-examined about them.

Ponder the questions. Give yourself time to formulate an

honest short and direct answer. Give your lawyer time to analyze the question should an objection be necessary.

Watch out for an examiner who conducts an informal but rapid conversation of rapid questions and answers to lead you and get you to agree with his or her version of the facts. Remember you are dictating a transcript. If necessary, reflect on and slow your answers.

If the examiner tries to build you up with flattering questions beware that he or she is setting you up to show that you or your colleagues did not measure up to those inflated standards.

Do not take the examiner's friendly manner at face value. Pay attention to the examiner's choice of words. Beware if he or she asks, "Do you always ...?"

If you did not understand the question or need time to analyze it, ask the lawyer to repeat it or have the court reporter read it back. Answer the question posed, not what you have guessed the lawyer is trying to ask. Let the attorney earn the fee.

Remember that at trial a portion of the deposition may be taken out of context and used to impeach you or offered into evidence. Try to answer each question so that the reader understands your testimony without reference to an explanation provided earlier in the deposition.

If you cannot remember, say so. If you are not sure, qualify your answer by saying "approximately" or "to the best of my recollection." You are required to tell the truth, not to speculate.

Be careful when explaining times, amounts, degrees and the like. Be sure your answers explain things in the proper time frame.

If asked to second-guess what another person did, remember that it is easier to have 20/20 hindsight. Without knowing all that was involved in another person's actions, you are second guessing. Your oath does not require that you speculate.

PROCEDURES:

Listen to your lawyer's objection; they may indicate what was wrong with the question.

An examiner can sometimes recreate a false or incomplete picture by asking only certain questions. It is not your job to clarify the record. Your lawyer will decide whether to obtain a fuller explanation either in deposition or at trial. Do not volunteer.

Even when the question calls for a yes or no answer, you have the right to explain your answer briefly if qualification is necessary. But be careful and try not to volunteer.

Beware of hypothetical questions formulated to be analogous to the facts but that omit essential information.

With any exhibit you are asked about, verify its effective date, check for completeness, consider the source, and be careful about speculating about why it was prepared unless you know.

CAUTIONS:

If you are questioned about embarrassing matters and your lawyer decides that you have to answer, be forthright and give a

careful explanation of what happened. Arrests, failure in school, previous accidents, business failures, and the like may have little bearing or relevance on the litigation but if you hide it and the opposition discovers that, your credibility will be damaged or destroyed. That is called impeachment.

Be careful of questions such as, "Are these all the documents you have reviewed?" or "Have you told me everything you know?" Qualify your answers in case you remember something between deposition and trial.

Do not be embarrassed but readily admit that you had a conference with your lawyer. That question is usually asked with raised eyebrows. Such a briefing is not only proper but necessary. The subject may be privileged, but that you conferred is not.